Supreme Court, U.S.
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No. 06-506

In The

Supreme Court of the United States

ALLAN S. MATTHEWS,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The interpretation of 38 U.S.C. § 1114(j): May the VA use a superceded version of this statute to calculate the amount of past due benefits payable to a successful claimant for VA benefits?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 456 F.3d 1377 (Fed. Cir. July 13, 2006). The opinion of the United States Court of Appeals for Veterans Claims (App. 7) was not reported because it was a single judge memorandum decision, *Matthews v. Nicholson*, 19 Vet. App. 510 (2005) (Westlaw No. 04-733).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1110 of Title 38, United States Code (2002), provides as follows:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran

> thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

Section 1114(j) of Title 38, United States Code, provided as follows in 2002:

> For purposes of section 1110 of this title – (j) if and while the disability is rated as total the monthly compensation shall be $2,163.

STATEMENT OF THE CASE

A. Petitioner's Claim

The rates of veterans disability compensation have been changed by Congress often but not necessarily annually in modern years, to adjust them according to the cost of living. However, nothing requires that result. That is, it is not automatic, as are adjustments to some other benefits. Instead, the statute is amended by vote and legislation.

In March 2002, the VA awarded Mr. Matthews disability compensation effective from August 5, 1994. App. 49. The VA was then required to calculate the amount of unpaid, "back" compensation payable to Mr. Matthews for the intervening period, 1994-2002. The VA calculated the amount of compensation to be paid to Mr. Matthews by relying upon the rates of compensation during nine

different periods from 1994 to 2002. In doing so, the VA applied a different rate for each period, based on the version of 38 U.S.C. § 1114(j) which had existed in each of the separate periods. *Id.* Mr. Matthews appealed the VA's interpretation of the pertinent statute, 38 U.S.C. § 1114(j), to the United States Court of Appeals for Veterans Claims (Veterans Court). It affirmed the VA practice of calculating the amount of compensation payable by applying the rates set prior and superceded versions of § 1114(j).

B. The Decisions Below

On March 4, 2004, the Board of Veterans' Appeals (the "Board") found that Mr. Matthews was not entitled to any additional compensation. App. 11. On April 26, 2005, the Veterans Court affirmed the 2004 Board decision, without reaching the question of statutory interpretation presented, relying on *Sandstrom v. Principi*, 358 F.3d 1376, 1380 (Fed. Cir. 2004). App. 7. On July 13, 2006, the United States Court of Appeals for the Federal Circuit (Federal Circuit) agreed with the Veterans Court that Mr. Matthew's case was governed by *Sandstrom v. Principi*, and it affirmed.

The Federal Circuit acknowledged that Mr. Sandstrom had argued that he was entitled to *interest* on his past due benefits based on his interpretation of 38 U.S.C. § 5109A(b). *See Sandstrom*, 358 F.3d at 1377. Mr. Matthews argued that he was not seeking interest, that he was not asking for an increased award of compensation based on an interpretation of 38 U.S.C. § 5109A(b), and therefore that *Sandstrom* was not controlling. The Federal Circuit, without interpreting 38 U.S.C. § 1114, disagreed,

concluded that *Sandstrom* was controlling, and affirmed the decision of the Veterans Court.

REASONS FOR GRANTING THE WRIT

The Federal Circuit did not interpret and has not previously interpreted 38 U.S.C. § 1114(j). Neither the VA nor the Veterans Court have interpreted 38 U.S.C. § 1114(j).

The Federal Circuit's failure to interpret this statute leaves every disabled veteran awarded compensation under 38 U.S.C. § 1110 at the mercy of the VA's unpublished interpretation of 38 U.S.C. § 1114(j) which permits the VA to use superceded versions of § 1114(j) to calculate the amount of past due benefits payable to disabled veterans. The Federal Circuit's action affects thousands of veterans who have been and will be awarded VA compensation under § 1110.

The VA's use of prior versions of § 1114(j) to calculate the amount of past due benefits payable to disabled veterans allows the VA to underpay the amount of VA benefits by applying rates other than those dictated by the version of the statute in effect when the award is made. The Federal Circuit failed to interpret the statute and disposed of the appeal based on an argument presented in another case involving the interpretation of another VA statute.

This Court should grant certiorari and reverse the Federal Circuit for two reasons: First, Mr. Matthews presented the question of statutory interpretation to the Veterans Court, and to the Federal Circuit, but neither

court interpreted the statute; and second, to prevent the continuing denial to disabled veterans of the full amount of compensation specified by statute.

I. An Interpretation of 38 U.S.C. § 1114 Is Required.

Mr. Matthews had presented to the VA a challenge to its historical practice, begun and continued without the benefit of any regulation. App. 44 and App. 39. In response the Board of Veterans' Appeals found that the VA had calculated the amount due and payable to Mr. Matthews in accordance with VA practices. App. 11. The decisions of both the Veterans Court and the Federal Circuit denied Mr. Matthews his statutory right to judicial review. Mr. Matthews presented a question of law – specifically, the interpretation of 38 U.S.C. § 1114(j) – but both courts failed to afford Mr. Matthews judicial review.

Congress granted the Veterans Court exclusive jurisdiction to review decisions by the Board. *See* 38 U.S.C. § 7252(a). Congress further provided that the Veterans Court was to "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions. . . . " *See* 38 U.S.C. § 7261(a)(1). The Veterans Court did not decide the question of statutory interpretation of 38 U.S.C. § 1114(j) but instead the Veterans Court concluded, without having interpreted § 1114(j), that the Federal Circuit's decision in *Sandstrom*, *supra*, was controlling. App. 7.

The scope of review under which the Federal Circuit reviews decisions of the Veterans Court is established by 38 U.S.C. § 7292. In reviewing a decision of the Veterans

Court, the Federal Circuit is required to decide "all relevant questions of law, including interpreting constitutional and statutory provisions" relied upon by the Veterans Court that it finds to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1) (2000). The Federal Circuit reviews legal determinations of the Veterans Court *de novo. E.g., Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

In *Linville v. West*, 165 F.3d 1382 (Fed. Cir. 1999), the Federal Circuit held that its jurisdiction was implicated even when the Veterans Court failed to address a question of statutory interpretation, so long as that question had been presented by the appellant to the Veterans Court. Mr. Matthews presented the question of law concerning the interpretation of 38 U.S.C. § 1114(j). App. 21. The Veterans Court did not address the question of law presented. Mr. Matthews timely appealed the decision of the Veterans Court, and once again was denied his right to judicial review of the question of law presented. The decisions of the Veterans Court and the Federal Circuit in Mr. Matthews's appeals circumvent the intent and purpose of judicial review.

Mr. Matthews may not have the right to the interpretation he seeks, but he does have a right to an interpretation. The question of law presented by Mr. Matthews is not merely relevant to his individual circumstances. The question of law presented by Mr. Matthews is relevant to every disabled veteran awarded VA compensation under 38 U.S.C. § 1110 and calculated by the VA under 38 U.S.C.

§ 1114(j). Mr. Matthews does not ask this Court to interpret § 1114 in the first instance. Mr. Matthews's petition seeks only a remand to the Federal Circuit with instructions to that Court to interpret § 1114. When Congress enacted the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), all veterans were afforded the right to judicial review. The decision of the Federal Circuit in this appeal has frustrated that intent.

II. Ambiguous VA Statutes Must Be Interpreted to Favor Veterans.

This Court has held that ambiguities in statutes providing benefits to veterans must be resolved in the veteran's favor. *E.g.*, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991); *see Brown v. Gardner*, 513 U.S. 115, 118 (1994).

The principle adopted by this Court tha interpretative doubt is to be resolved in favor of veterans is supported by decisions extending over more than half a century. *See Gardner*, 513 U.S. at 118; *King*, 502 U.S. at 220-221, n.9 ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); *Fishgold*, 328 U.S. at 285 ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). A judicial interpretation is required because the VA has not interpreted 38 U.S.C. § 1114 by regulation.

Veterans have a special status in our society. *See United States v. Oregon*, 336 U.S. 643, 647 (1961) ("This natural construction we give to § 1 makes it fit well in the pattern of legislation dealing with this subject. The solicitude of Congress for veterans is of long standing."). It has been said, "The problems of readjustment will be difficult for all of us. They will be particularly difficult for those who have spent months and even years at the battle fronts all over the world. Surely a grateful nation will want to express its gratitude in deeds as well as in words." *Mitchell v. Cohen*, 333 U.S. 411, 419, n.12 (1948) (Letter from the President to Rep. Ramspeck, quoted in H.R. Rep. No. 1289, 78th Cong., 2d Sess., p. 5). Veterans have earned their special status by shouldering the burdens of defending the United States.

Mr. Matthews has not only been denied the benefit of a judicial interpretation of § 1114 but has also been deprived of the benefit of the special canons of construction mandated by this Court. The Federal Circuit's decision, which avoid any interpretation of § 1114 necessarily deprived Mr. Matthews of the benefit of the special canons of construction of that statute. This Court has interpreted its holding in *Fishgold* broadly as establishing "the canon that *provisions* for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King*, 502 U.S. at 220-221, n.9 (emphasis supplied) (interpreting statute but stating that canon applies to "provisions"); *see Brown*, 513 U.S. at 117-118 (noting canon applies to resolution of interpretive doubt without restriction as to source from which ambiguity emanates).

Congress has emphasized the historically non-adversarial system under which veterans benefits are intended to be administered:

> *Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits.* This is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex parte system of adjudication in which Congress expects [the VA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, *[the VA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.*

H.R. Rep. No. 100-963 at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added). Congress expressly expects the VA to resolve "all issues," including ambiguities in its statutes, in favor of veterans. *Id.* The VA is distinct from other agencies because of its pro-claimant, non-adversarial nature, and that distinction further supports application of the *Gardner* Rule. *See, e.g., Elkins v. Gober*, 229 F.3d 1369, 1376 (Fed. Cir. 2000) (allowing piecemeal appeals because of the "pro-claimant, nonadversarial, ex parte system that supplies veterans benefits"); *see also Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (stating veterans' statutes must be liberally construed for benefit of returning veteran) (citations omitted); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (concluding "in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systematic fairness and the appearance of fairness carries great weight"); *Collaro v.*

West, 136 F.3d 1304, 1309-1310 (Fed. Cir. 1998) (describing "a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims").

The VA has never adopted an interpretation of § 1114 in any VA regulation, and thus there is no VA interpretation to which to defer as required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). More importantly there has never been a judicial determination that the language of § 1114 was ambiguous or was other than plain on its face. Neither the Veterans Court nor the Federal Circuit have been willing to interpret the statute. Instead, each have relied upon the holding in *Sandstrom v. Principi*, 358 F.3d 1376 (Fed. Cir. 2000), on a different issue, *i.e.*, interest against the United States.

Thus, no determination has ever been made concerning the ambiguity of its language. The required procedure should have been for both courts to determine whether the statute was ambiguous. If it had been found to be ambiguous, then the court should have looked next to the special rules of statutory construction for VA statutes. If the Federal Circuit had followed this Court's precedent, then it would have applied those special canons of statutory construction.

The need for an interpretation of § 1114 is heightened because of this unique statutory scheme for provision of benefits to veterans. This statute deals with how the VA must calculate the VA's award of VA benefits. The Court should grant the petition and order Mr. Matthews's appeal returned to the Federal Circuit for an interpretation of 38 U.S.C. § 1114(j).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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456 F.3d 1377

United States Court of Appeals
for the Federal Circuit

05-7163

ALLAN S. MATTHEWS,

Claimant-Appellant,

v.

R. JAMES NICHOLSON, Secretary of Veterans Affairs,

Respondent-Appellee.

Kenneth M. Carpenter, Carpenter, Chartered, of Topeka, Kansas, argued for claimant-appellant.

Sean McNamara, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. On the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; Bryant G. Snee, Assistant Director; and Alan J. Lo Re, Senior Trial Counsel. Of counsel on the brief were Richard J. Hipolit, Assistant General Counsel, and Martie S. Adelman, Attorney, United States Department of Veterans Affairs, of Washington, DC.

Appealed from: United States Court of Appeals for Veterans Claims

Judge Alan G. Lance

DECIDED: July 13, 2006

Before NEWMAN, RADER, and PROST, Circuit Judges.

PROST, Circuit Judge.

On August 5, 1994, Allan S. Matthews, a veteran of the United States Navy, submitted a claim for post traumatic stress disorder with the Veterans Administration (the "VA") regional office (the "RO"). In March 2002, Mr. Matthews was awarded a 100% service connected disability rating, which was effective from the date of his claim in 1994. The retroactive benefits were calculated by dividing the time from 1994 to 2002 into nine time periods. The VA awarded Mr. Matthews the monthly compensation rate in effect during each time period. Mr. Matthews disputed this method used to calculate his benefits arguing that his past due benefits should all be calculated by applying the monthly compensation in effect in 2002 to the entire period from 1994 to 2002. On March 4, 2004, the Board of Veterans' Appeals (the "Board") found that Mr. Matthews was not entitled to any additional compensation and the decision was subsequently affirmed by the United States Court of Appeals for Veterans Claims (the "CAVC"). We agree with the CAVC that this case is governed by our precedent in *Sandstrom v. Principi,* 358 F.3d 1376, 1380 (Fed. Cir. 2004), and therefore we affirm.

I.

Compensation for a disability rating is governed by 38 U.S.C. § 1114. This statute has been amended periodically

in an effort to increase the monthly compensation to keep pace with cost of living increases. In this case, Mr. Matthews was awarded a 100% disability rating in 2002 that dated back to his original 1994 claim. *See* 38 U.S.C. § 1114(j) (2000). In calculating Mr. Matthews's past due retroactive benefits, the VA divided the time from 1994 to 2002 into nine time periods corresponding to the amendments of the statutory compensation. For each time period, Mr. Matthews was awarded the monthly compensation rate from the then-current version of 38 U.S.C. § 1114(j).

Before the CAVC, Mr. Matthews argued that this method of computing his retroactive compensation was incorrect as it conflicted with the plain language of the statute. The 2002 version of the statute states that "if and while the disability is rated as total the monthly compensation shall be $2,163." *Id.* § 1114. Mr. Matthews argued that this monthly compensation of $2,163 should be applied to both his ongoing monthly compensation as well as to his retroactive compensation. Thus, instead of using the previous versions of 38 U.S.C. § 1114(j) and their lower compensation rates, Mr. Matthews argued that the VA was required to calculate his entire eight years of past due compensation with the 2002 statutory amount.

The CAVC disagreed, relying on *Sandstrom v. Principi* for its holding that 38 U.S.C. § 1114 does not require that retroactive benefits be calculated based on the statute's current amount of compensation. 358 F.3d at 1380. Mr. Matthews argued, however, that *Sandstrom* was distinguishable because it involved an award of retroactive benefits due to a finding of clear and unmistakable error ("CUE") and his case did not. Nonetheless, the CAVC found that the "difference in the procedural history

[between *Sandstrom* and this case] as to this claim is irrelevant and *Sandstrom* is controlling." *Matthews v. Nicholson,* No. 04-733, (Vet. App. Apr. 26, 2005). Accordingly, the CAVC affirmed the Board decision. Mr. Matthews appealed that decision to this court. We have jurisdiction under 38 U.S.C. § 7292(a).

II.

In reviewing a CAVC decision, this court decides "all relevant questions of law, including interpreting constitutional and statutory provisions" and must set aside any regulation or interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1) (2000). This court reviews legal determinations of the CAVC under a de novo standard. *Prenzler v. Derwinski,* 928 F.2d 392, 393 (Fed. Cir. 1991).

On appeal, Mr. Matthews bases his arguments for an increased award solely on an interpretation of 38 U.S.C. § 1114 and its statement that "if and while the disability is rated as total the monthly compensation shall be $2,163." 38 U.S.C. § 1114 (2000). He argues that the text of § 1114 plainly directs all compensation whether ongoing or retroactive to be calculated with the dollar amount stated in the current version of the statute.

Furthermore, Mr. Matthews argues that *Sandstrom* is distinguishable and the CAVC erred when it relied on

Sandstrom. He points out that, even though *Sandstrom* also dealt with a dispute over the method of calculating past due benefits, Sandstrom was arguing that he was entitled to interest on his past due benefits based on an interpretation of 38 U.S.C. § 5109A(b). *See Sandstrom,* 358 F.3d at 1377. In this case, Mr. Matthews argues that he is neither seeking interest nor premising his increased award on an interpretation of 38 U.S.C. § 5109A(b) and thus *Sandstrom* is not controlling. We disagree and find *Sandstrom* is controlling in this case.

Although *Sandstrom* does reject the argument that retroactive benefits should include interest based on an interpretation of 38 U.S.C. § 5109A(b), in that case this court was also presented with and rejected an interpretation of 38 U.S.C. § 1114 identical to the one made by Mr. Matthews. In *Sandstrom* we stated that:

> Sandstrom also argues that he is simply requesting payment of the dollar amount written into the version of 38 U.S.C. § 1114(n) in effect at the time of the CUE correction. This argument would be tantamount to reading the statute's incorporation of an explicit dollar amount as a waiver of sovereign immunity and as an expression of a willingness to compensate veterans disadvantaged by a CUE in real, rather than in nominal, dollars. *This argument fails because § 1114 does not address the issue of retroactive payments. . . .*

358 F.3d at 1380 (emphasis added). This is the same argument made by Mr. Matthews, and just as in *Sandstrom,* Mr. Matthews's argument fails because 38 U.S.C. § 1114 applies only to current monthly payments; it "does not address the issue of retroactive payments." *Id.* The CAVC properly applied *Sandstrom* to this case and it

properly denied Mr. Matthews's claim for increased retroactive benefits.

III.

The CAVC properly applied our precedent in *Sandstrom* to this case. The version of 38 U.S.C. § 1114 that is in force when a retroactive benefit is awarded is not used in calculating retroactive awards dating back to periods with previous versions of 38 U.S.C. § 1114.

AFFIRMED

2005 WL 1004483

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 04-733

ALLAN S. MATTHEWS, APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

LANCE, Judge: The appellant, Allan S. Matthews, through counsel, appeals a March 4, 2004, Board of Veterans' Appeals (Board or BVA) decision in which the Board denied his claim for a higher disability rating for his service-connected post-traumatic stress disorder (PTSD). Record (R.) at 1-10. The appellant and the Secretary filed briefs. Single-judge disposition is appropriate when, as here, the issues are of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons set forth below, the Court will affirm the decision.

I. FACTS

The appellant had active duty service in the U.S. Navy from February 1962 to April 1964. R. at 12. On

August 5, 1994, the appellant submitted to a VA regional office (RO) a claim for service connection for PTSD. R. at 420-24. In March 2002, he was awarded service connection with a 100% disability rating effective from the date of his claim. R. at 656-62. The amount of retroactive benefits due to the appellant was calculated by dividing the time period from August 1994 to February 2002 into nine different time periods and applying the monthly compensation rate applicable to each time period. R. at 680.

The appellant filed a Notice of Disagreement disputing the effective date of the award of service connection and the method used to calculate the award of his benefits. R. at 679-82. On March 4, 2004, the Board issued the decision here on appeal. R. at 1-10. The Board rejected both of the appellant's claims. R. at 1-10.

On March 1, 2005, the Court granted the parties' joint motion to withdraw the effective-date issue in this appeal. As to the calculation of benefits, in his brief the appellant asserts that 38 U.S.C. § 1114(j) requires that an award of retroactive benefits must be paid in its entirety at the compensation rate in effect on the date of payment. Appellant's Brief (Br.) at 10-13. The appellant asks the Court to reverse the Board's decision and remand the matter with instructions that the Board direct the Secretary to recalculate his award. *Id.* at 16. In his brief, the Secretary argues that the appellant's argument amounts to adding interest to a benefit award, which is forbidden unless there is a clear and unambiguous waiver of sovereign immunity by Congress. Secretary's Br. at 3-7. Accordingly, he asks the Court to affirm the Board decision. *Id.* at 7.

II. ANALYSIS

The appellant contends that 38 U.S.C. § 1114(j) (2001) requires that his entire award of benefits be calculated at the monthly rate in effect on the date of the award, March 2002, rather than applying the different nominal rates in effect during the years from 1994 to 2002. The issue raised by the appellant is one of statutory interpretation, which the Court reviews de novo. *DeBeaord v. Principi*, 18 Vet.App. 357, 363 (2004).

Section 1114 states: "For the purposes of section 1110 of this title – . . . if and while the disability is rated as total the monthly compensation shall be $2,163." However, section 1114 of title 38 – as frequently amended – merely sets forth rates of compensation. Appellant's suggestion that section 1114 requires that an award of retroactive benefits must be calculated at the rate in effect at the time of payment was expressly rejected by the Federal Circuit in *Sandstrom v. Principi*, 358 F.3d 1376, 1380 (Fed.Cir.2004). Under functionally identical facts, the Federal Circuit concluded that the argument of the appellant there was the equivalent of asking for interest on the retroactive award and that the language of section 1114 did not contain "a clear, explicit waiver of the government's sovereign immunity from interest payments." *Id.*

Appellant seeks to distinguish *Sandstrom* on the basis that the retroactive payment in that case was based on a finding of clear and unmistakable error in a prior decision rather than an initial award of benefits. Appellant's Br. at 14-15. This distinction is irrelevant because section 1114 sets compensation rates for all wartime disability claims without regard to whether the claim is a new claim, a claim reopened on the basis of new and material evidence,

or a claim retroactively granted on the basis of clear and unmistakable error in a prior decision. Although *Sandstom* also rejected additional arguments based upon statutes relating to clear and unmistakable error, it clearly addressed the interpretation of section 1114 as a separate argument. Hence, the difference in the procedural history as to this claim is irrelevant, and *Sandstrom* is controlling.

Accordingly, the Court will affirm the Board decision.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's, decision is AFFIRMED.

DATED: Apr. 26, 2005

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[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF ALLAN S. MATTHEWS — C 22 881 141

DOCKET NO. 03-08 672A) DATE MAR 04, 2004
)
)

On appeal from the
Department of Veterans Affairs Medical and Regional Office Center in Wichita, Kansas

THE ISSUES

1. Entitlement to an earlier effective date prior to August 5, 1994, for a grant of service connection for post-traumatic stress disorder (PTSD).

2. Entitlement to payment of VA compensation at the 2001 rate for an award of a total rating for PTSD in retroactive monthly payments effective from September 1, 1994.

REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Esq.

ATTORNEY FOR THE BOARD

Bernard T. DoMinh, Counsel

INTRODUCTION

The veteran served on active duty from February 1962 to April 1964.

This mailer comes to the Board of Veterans' Appeals (Board) on appeal from a February 2002 rating decision by the Wichita, Kansas, Regional Office (RO) of the Department of Veterans Affairs (VA) which, *inter alia*, granted the veteran service connection and a 100 percent evaluation for PTSD (effective from August 5, 1994).

FINDINGS OF FACT

1. The veteran's original claim of entitlement to service connection for a psychiatric disability was filed on July 29, 1976, and denied in a September 1976 rating decision which became final.

2. Unappealed and final rating decisions dated January 1981, August 1989 and December 1991 denied the veteran's applications to reopen his claim of entitlement to service connection for a psychiatric disability for failure to submit new and material evidence.

3. On August 5, 1994, the veteran submitted a successful application to reopen his claim of entitlement to service connection for a psychiatric disability.

4. The deck logs of the *USS Coral Sea* which corroborated the veteran's in-service stressor accounts pertaining to his PTSD claim are not service department records which are individually specific to the veteran.

5. The applicable laws and regulations do not provide a basis for payment of the veteran of VA compensation at the 2001 rate for an award of a total rating for PTSD in retroactive monthly payments effective from September 1, 1994.

CONCLUSIONS OF LAW

1. An effective date earlier than August 5, 1994, for the grant of service connection for PTSD is not warranted. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. §§ 3.156, 3.400 (2002).

2. Payment of VA compensation at the 2001 rate for an award of a total rating for PTSD in retroactive monthly payments effective from September 1, 1994 is not warranted. 38 U.S.C. §§ 1104, 1114; *Sabonis v. Brown*, 6 Vet. App. 426 (1994).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Preliminary Matters

The Veterans Claims Assistance Act of 2000 (VCAA), implemented in 38 U.S.C.A. §§ 5103, 5103A (West 2002), now requires VA to assist a claimant in developing all facts pertinent to a claim for VA benefits, including a medical opinion and notice to the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the VA Secretary, that is necessary to substantiate the claim. VA has issued regulations to implement the VCAA of 2000. 66 Fed. Reg. 45,620 (Aug. 29, 2001) (codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2003)).

According to VA's General Counsel, the notice provisions of VCAA are not applicable as to issues that are raised initially in a notice of disagreement. VAOPGCPREC (December 22, 2002). Both issues presented in this claim arise from a notice of disagreement filed in response to the RO decision to grant service connection in February 2002.

Therefore, the notice provisions of VCAA are not applicable.

(a.) Factual Background and Analysis: entitlement to an earlier effective date prior to August 5, 1994, for a grant of service connection for PTSD.

A review of the history of the veteran's claims shows that he filed his original claim for VA compensation for a psychiatric disability on July 29, 1976. At the time, the veteran's service medical records were reviewed and showed no diagnosis of, or treatment for a chronic psychiatric disorder during active duty. In a rating decision dated September 1976 the RO determined that there was no evidentiary basis at that time to allow the claim. The RO also issued a letter to the veteran in September 1976 informing him of the absence of any evidence of onset of a psychiatric disability during service and requesting that he provide VA with any evidence in his possession or information of the existence of any evidence (*i.e.*, medical records and lay witness statements) that would support his claim. The RO stated that the veteran had one year from the date of the letter to submit the requested information; otherwise, no benefits would be payable on the basis of the pending claim. The claims file indicates that the veteran failed to respond within one year following the September 1976 RO letter and the claim was denied. Thereafter, the file shows that the veteran made several attempts to reopen his previously denied claim for service connection for a psychiatric disability. These attempts were denied in unappealed and final rating decisions dated January 1981, August 1989 and December 1991 for failure to submit new and material evidence. The medical evidence of record which were associated with these

attempts to reopen his claim shows that the veteran's psychiatric diagnoses included generalized anxiety disorder, panic attacks but did not at the time include a diagnosis of PTSD.

The claims file shows that on August 5, 1994, the veteran submitted an application to reopen his claim for VA compensation for a psychiatric disability. Accompanying this application was medical evidence that shows that he was diagnosed with PTSD in August 1992. Subsequent medical evidence obtained in the course of his claim linked the PTSD diagnosis to his accounts of being exposed to various stressors during active duty while serving aboard the flight deck of the aircraft carrier *USS Coral Sea*, in which he witnessed several fatal aviation-related accidents. Although the veteran's service medical records and personnel records show that he served aboard the *USS Coral Sea*, they did not contain any information that corroborated his allegations. However, copies of the official deck logs of the *USS Coral Sea* were obtained and associated with the claims file and these contained flight deck accident reports that corroborated the veteran's stressor accounts. Based on this evidence, by rating decision of February 2002 the RO granted the veteran service connection and a 100 percent rating for PTSD, effective August 5, 1994.

The veteran now contends that he is entitled to an earlier effective date for his award of service connection for PTSD. His primary assertion is that the flight deck records of the *USS Coral Sea* are part of his service department records which were previously misplaced and now submitted as new and material evidence. As such, he asserts that the flight deck records of the *USS Coral Sea* provide a basis under 38 C.F.R. § 3.159(c) (2003) to allow for the

assignment of an effective date for the service connection award extending back to July 29, 1976: the date upon which the original claim for service connection for a psychiatric disability was filed.

The assignment of effective dates of awards is generally governed by 38 U.S.C.A. § 5110 (West 2002) and 38 C.F.R. § 3.400 (2003). Unless specifically provided otherwise, the effective date of an evaluation and award of compensation based on an original claim or a claim reopened after final disallowance "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore." 38 U.S.C.A. § 5110(a). The implementing regulation clarifies this to mean that the effective date of an evaluation and an award of compensation based on an original claim or a claim reopened after final disallowance "will be the date of receipt of the claim or the date entitlement arose, whichever is the later." 38 C.F.R. § 3.400. With a reopened claim for service connection after a final disallowance based on submission of new and material evidence, the effective date of an award will the date of receipt of the new claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(q)(ii). However, in cases where the new and material evidence consists of service department records, the effective date assigned is to agree with the evaluation (since it is considered that these records were lost or mislaid) or the date of the prior receipt of the claim on which prior evaluation was made, whichever is later, subject to rule on original claims filed within one year after separation from service.

38 C.F.R. § 3.156(c) provides that where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be

reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to VA. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly except as it may be affected by the filing date of the original claim.

Pursuant to the laws and regulations cited above, the effective date for service connection for PTSD should be the later date of either the date the veteran successfully applied to reopen his claim for service connection for a psychiatric disability, or the date that entitlement arose. As previously noted, the veteran had made several attempts to reopen his previously disallowed claim for service connection for a psychiatric disability following the final denial of his original claim which was filed on July 29, 1976. These attempts were denied in unappealed and final rating decisions dated January 1981, August 1989 and December 1991 for failure to submit new and material evidence. The veteran did not successfully apply to reopen his claim until August 5, 1994, when VA received his application to reopen his claim, accompanied by evidence showing a diagnosis of PTSD linked to service which was new and material to his psychiatric disability claim. On this basis, we find that the RO correctly assigned August

5, 1994 as the effective date for the grant of service connection for PTSD. We note the veteran's contention that the deck logs of the *USS Coral Sea* were part of his official military service department records which were previously misplaced, and that as such they formed a basis to allow an effective date prior to August 5, 1994, for a grant of service connection for PTSD. However, we find that his assertion is a misinterpretation of the intent of 38 C.F.R. § 3.156(c). This regulation was intended to protect the filing date of a veteran's claim when the factual basis for the allowance turned on facts presented in service medical and/or personnel records *specific to the individual veteran* which were misplaced at the time of the prior filing and which have been subsequently relocated and associated with the claim as new and material evidence. The deck logs of the *USS Coral Sea* are not the type of evidence which would usually be included in an individual veteran's personal service department records as they are military records which are specifically pertinent to a naval vessel and *not* to the individual veteran. Therefore, the veteran's contentions in this regard are rejected. For these reasons, an effective date earlier than August 5, 1994, for a grant of service connection for PTSD is not warranted.

(b.) Factual Background and Analysis: entitlement to payment of VA compensation at the 2001 rate for an award of a total rating for PTSD in retroactive monthly payments effective from September 1, 1994.

By rating action of February 2002, the veteran was granted service connection and a 100 percent rating for PTSD with August 5, 1994 as the effective date for the commencement of this award. In correspondence dated March 2002, the veteran was notified of the award and

presented with a graph showing that he would receive an initial retroactive monthly award payment at the 100 percent rate commencing on September 1, 1994, with incremental increases of the monthly award payments to accommodate cost of living increases mandated by Congress effective on each first day of December in the years subsequent to September 1994 all the way to the 2001 rate in effect at the time of the favorable rating decision. The veteran contends that retroactive monthly payment of the total rating award should be made at the 2001 rate effective from 1994.

Monthly compensation rates are established by law. *See* 38 U.S.C. § 1114. Congress may authorize an increase in the amount of monthly VA compensation rates each year based on the cost of living. The effective date of the cost of living increase is also one which is set by law. *See* 38 U.S.C. § 1104. The veteran is advised that there is no provision under laws administered by VA which allow for payment of the 2001 monthly rate of compensation prior to the date that the Public Law as enacted by Congress authorizes the increase in the monthly amount to take effect. Thus, his claim in this regard fails for the absence of legal merit or lack of entitlement under the law. The relevant facts are not in dispute. It is the law, not the evidence, which is dispositive of his claim for payment of VA compensation at the 2001 rate for an award of a total rating for PTSD in retroactive monthly payments effective from September 1, 1994. *See Sabonis v. Brown*, 6 Vet. App. 426 (1994). His retroactive payments of VA compensation at the 100 percent rate have been fully paid to him in accordance to the monthly compensation rates in effect for the specific year in which payment was due him. No additional retroactive payments may be allowed him as a matter of law.

ORDER

An earlier effective date prior to August 5, 1994, for a grant of service connection for PTSD is denied.

The claim for payment of VA compensation at the 2001 rate for an award of a total rating for PTSD in retroactive monthly payments effective from September 1, 1994, is denied.

/s/ G. H. Shufelt
G. H. SHUFELT
Veterans Law Judge,
Board of Veterans' Appeals

BRIEF OF THE APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 04-0733

ALLAN S. MATTHEWS,

Appellant,

v.

ANTHONY J. PRINCIPI,

Secretary of Veterans Affairs,

Appellee.

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Statement of the Issues

I. Whether the Board's Decision Misinterpreted and as a Consequence Failed to Apply 38 C.F.R. § 3.156(c)?

II. What is the Correct Rate of Disability Compensation?

Statement of the Case

This appeal involves determination of the effective date of an award of disability compensation under the

special circumstances addressed by 38 C.F.R. § 3.156(c), *i.e.*, VA's reliance on service department records requires an earlier effective date. It also involves the determination of the rate of disability compensation under 38 U.S.C. § 1114(j) for an award of back benefits. Both issues arise as the result of Mr. Matthews's long quest for disability compensation, involving repeated claims for reopening.

I. Course of Proceedings Below

1. The original 1976 claim was denied

Mr. Matthews served in the United States Army from February 1962 to April 1964. R. 12-13. On July 29, 1976, Mr. Matthews filed his original claim for a psychiatric disability.[1] On September 10, 1976, the VA denied disability compensation because his service treatment records did not show a diagnosis of a nervous condition. R. 167-168.

2. Claims to re-open in 1980 & 1989.

On October 2, 1980, Mr. Matthews filed a claim to reopen his previously denied claim for disability compensation for a nervous condition.[2] On January 19, 1981, the VA denied disability compensation on the basis that the service records were "otherwise negative for any complaints, findings, or diagnosis of . . . nerves." R. 181-182.

On January 9, 1989, Mr. Matthews again attempted to reopen his claim for disability compensation.[3] On August

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[1] This record in [sic] not contained in the record on appeal.

[2] This record in [sic] not contained in the record on appeal.

[3] This record in [sic] not contained in the record on appeal.

25, 1989, the VA denied reconsideration of service connection for anxiety disorder on the basis that there was no evidence to warrant a change in the denial of service connection for anxiety disorder. R. 186-187. On December 23, 1991, the VA confirmed the prior denials of service connection for anxiety disorder. R. 255.

3. New evidence in 1994 results in re-opening.

On August 4, 1994, Mr. Matthews filed significant amounts of new and material evidence to reopen the previously denied claim for disability compensation for a psychiatric disorder, specifically seeking compensation for post-traumatic stress disorder (PTSD). R. 420-424. On September 14, 1994, the VA denied disability compensation for PTSD. R. 435-437. Mr. Matthews filed a notice of disagreement on November 9, 1994. R. 439. On January 6, 1995, the VA submitted a statement of the case. R. 442-448. Mr. Matthews filed a substantive appeal on January 25, 1995. R. 450.

The Board, on September 26, 1996, remanded Mr. Matthews's claim to the regional office. R. 453-458. The VA submitted a supplemental statement of the case continuing the denial of disability compensation for PTSD on June 15, 1998.[4] On March 22, 1999, the Board denied Mr. Matthews's claim for disability compensation for PTSD. R. 568-580. Mr. Matthews appealed to this Court. On September 15, 1999, this Court vacated the March 1999 Board decision and returned the matter for readjudication. R. 591.

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[4] This record in [sic] not contained in the record on appeal.

4. Disability compensation awarded in 2002 at 100%.

On June 6, 2000, the Board remanded to the regional office with instructions to attempt to verify Mr. Matthews's in-service stressors. R. 597-609. On June 6, 2001, the VA submitted a supplemental statement of the case which continued the previous denial. R. 624-627. On September 25, 2001, the Board remanded to the regional office. R. 629-635. On October 29, 2001, Mr. Matthews submitted a National Archive letter dated August 15, 2001, which included photocopies of deck log entries from the *USS Coral Sea*. R. 637-649.

On May 14, 2002, the VA granted disability compensation to Mr. Matthews for post-traumatic stress disorder with an evaluation of 100% and an effective date of August 5, 1994. R. 656-661. On December 23, 2002, Mr. Matthews filed a notice of disagreement with the effective date assigned the grant of disability compensation from August 5, 1994,[5] the date of the successful claim to re-open. On March 3, 2003, the VA submitted a statement of the case. R. 666-677.

5. Disagreement with rate of compensation and effective date.

On March 3, 2003, Mr. Matthews filed a notice of disagreement with the calculation of the rate of disability compensation paid by the VA for his award of past-due benefits. R. 679-683. On April 15, 2003, Mr. Matthews filed a substantive appeal with the effective date assigned the grant of disability compensation for PTSD, asserting

[5] Mr. Matthews's notice of disagreement is not of record.

entitlement to an effective date of July 29, 1976. R. 685-688. On October 16, 2003, the VA submitted a statement of the case on the issue of the calculation of Mr. Matthews's past-due benefits amount. R. 698-717. On December 8, 2003, Mr. Matthews filed a substantive appeal with the calculation amount of his past-due benefits. R. 719-722.

On March 4, 2004, the Board of Veterans' Appeals denied Mr. Matthews's claims for entitlement to an effective date of July 29, 1976, for the grant of disability compensation for post-traumatic stress disorder and with the calculation of the amount of past-due benefits from September 1994 to March 2002. R. 1-10.

Summary of the Arguments

The Board's decision misinterpreted 38 C.F.R. § 3.156(c). Mr. Matthews's successful reopening was predicated in part upon the submission of new and material evidence: supplemental service records sent by National Archives including deck log entries from the *USS Coral Sea*. The correct interpretation of 38 C.F.R. § 3.156(c) required the Board to assign an effective date as early as the date of the original 1976 claim.

In addition, the Board's decision misapplied 38 U.S.C. § 1114(j). As a result, Mr. Matthews has been denied part of his disability compensation for the period from September 1994 to March 2002. Mr. Matthews was entitled to but did not receive a calculation of his award of a total disability based upon the law in effect at the time of the VA's decision to award those benefits. The calculation made by the VA and affirmed by the Board was based upon the *prior* versions of the law as it existed from September 1994 to March 2002. The VA did not award

disability compensation to Mr. Matthews until March 2002. The VA's calculation of past-due benefits based upon the law as it existed from September 1994 to March 2002 is contrary to the plain meaning of the statute.

Arguments

I. The Board's Decision Misinterpreted and as a Consequence Failed to Apply 38 C.F.R. § 3.156(c).

Mr. Matthews's **original** claim for disability compensation for PTSD was denied based upon the fact that his service medical records did not contain a diagnosis or treatment of a psychiatric disorder. R. 167. Mr. Matthews unsuccessfully attempted to reopen his claim for disability compensation.

It was not until March 14, 2002, when the VA's decision review officer considered the new evidence, that Mr. Matthews's claim for disability compensation for PTSD was re-opened. It was re-opened because he submitted supplemental service department records sent to him by the National Archives, photocopies of deck logs from the *USS Coral Sea*. R. 656-661. As a consequence, under 38 C.F.R. § 3.156(c), Mr. Matthews is, as a matter of law, entitled to an effective date and a retrospective rating for his service-connected PTSD from the date of his original claim, July 29, 1976.

The Board's 2004 decision cited to, but did not correctly apply 38 C.F.R. § 3.156(c). The Board misinterpreted § 3.156(c), not Mr. Matthews. *Cf.* R. 7. The Board specifically concluded that:

> The deck logs of the *USS Coral Sea* are not the type of evidence which would usually be included in an individual veteran's *personal* service department records as they are military records which are specifically pertinent to a naval vessel and *not* to the individual veteran.

(R. 7) (emphasis added).

This is a misinterpretation of 38 C.F.R. § 3.156(c). The plain language of the regulation describes the new and material evidence as consisting "of a supplemental report from the service department." This language does not define, explain, or otherwise limit what constitutes a "supplemental report from the service department." It clearly *does not* refer to "evidence which would usually be included in an individual veteran's *personal* service department records." The Board's *post hoc* rationalization is a thinly disguised *adversarial* and baseless attempt to justify the VA's failure to properly apply § 3.156(c) in this case.

It is the VA's reliance on "new and material evidence in the form of supplemental service department records" which implicated 38 C.F.R. § 3.156(c). R. 656-661. But for the VA's failure to apply § 3.156(c) correctly, an effective date of July 29, 1976, would have been assigned for the grant of total disability compensation for PTSD to Mr. Matthews.

38 C.F.R. § 3.156(c) states in pertinent part:

> The retrospective evaluation of disability resulting from disease or injury **subsequently service connected on the basis of new evidence** from the service department must be supported adequately by medical evidence. Where such

> records clearly support the assignment of a specific rating **over part or the entire period** of time involved, a **retroactive evaluation** will be assigned accordingly except as it may be affected by the filing date of the original claim.

(Emphasis added).

The 2002 rating decision was based upon new evidence which verified Mr. Matthews's alleged in-service stressors and supported his diagnosis of PTSD. The deck logs are included under the regulation's phrase, "supplemental report of the service department." R. 637-649. The **new evidence** from the National Archives confirmed that Mr. Matthews had been exposed to the requisite stressors to support the diagnosis and award of disability compensation for PTSD. R. 637-649.

The **new evidence** provided to the VA was not previously considered by the VA as **new evidence** from the service department as contemplated by 38 C.F.R. § 3.156(c). Therefore, the **new evidence** from the service department triggered the application of 38 C.F.R. § 3.156(c). This evidence was dispositive of **both** entitlement to reopen the previously denied claim and award of disability compensation for PTSD. Pursuant to 38 C.F.R. § 3.156(c), this **new evidence** from the service department **should have been** utilized by the VA, or thereafter by the Board, for the assignment of an effective date **back to** the date of the original claim. The Board's failure to do so was based upon its misinterpretation of 38 C.F.R. § 3.156(c).

The Board's decision in this matter misinterprets the plain language and express mandate of 38 C.F.R. § 3.156(c) regarding the assignment of an effective date

based upon the receipt of **new evidence** from service department records. The VA's prior decisions in 1976 R. 165; 1981, R. 181; 1989, R. 186; 1991, R. 255; 1994, R. 435-437; 1998; and the 1999 Board decision, R. 568-580, and 2001 supplemental statement of the case, R. 624-627, **did not consider** the **new evidence** from these service department records, the deck logs of the *USS Coral Sea.* When this new evidence was considered it was sufficient to reopen the previously disallowed claim for disability compensation for a nervous condition and to grant disability compensation for post-traumatic stress disorder. R. 656-661.

In ***McGrath v. Gober***, 14 Vet.App. 28 (2000), this Court held that the date the evidence is submitted or received is **irrelevant** when considering the effective date of the award. ***McGrath,*** 14 Vet.App. at 35. In ***McGrath,*** the Court relied upon the mandatory language of 38 U.S.C. § 5110(a). The Court noted that under the statute, "the effective date of an award based on an original claim . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of the application therefor." ***McGrath,*** 14 Vet.App. at 35. In this matter, Mr. Matthews **successfully** reopened his previously denied claim for disability compensation for PTSD based upon **new evidence** from service department records. R. 656-661. The original rating decision of September 1976 and all of the subsequent rating decisions **obviously** had not considered **all** of the **relevant** service department records in denying Mr. Matthews's previous claims for disability compensation for PTSD. R. 165; R. 181; R. 186; R. 255; R. 435-437; R. 568-580; R. 624-627. The decision review officer's 2002 decision, which granted disability compensation for PTSD, **obviously** was based upon **new**

evidence received from the National Archives, the deck logs of the *USS Coral Sea* which verified Mr. Matthews's in-service stressors to support the diagnosis of PTSD. R. 656-661.

In the original adjudication of Mr. Matthews's claim, the VA had an affirmative duty to "develop[e] the facts pertinent to the claim. *See* 38 C.F.R. § 3.103(a). In this claim that should have included getting the pertinent entries from the deck logs of the *USS Coral Sea*. *See* ***Roberson v. Principi***, 251 F.3d 1378 (Fed.Cir. 2001); *see also* ***Szmeraj v. Principi***, 357 F.3d 1370 (Fed.Cir. 2004) (***Roberson*** *is* not limited to its particular facts). It is equally clear that the VA was under an affirmative duty in 1976 and thereafter to collect **all** relevant service records. *See* ***Hayre v. West***, 188 F.3d 1327, 1330 (Fed. Cir. 1999) (reversed on other grounds). It did not do that, and so Mr. Matthews's disability compensation was unnecessarily delayed until he did for the VA what the VA should have done for him in 1976.

Therefore, the Court should find that the Board misinterpreted 38 C.F.R. § 3.156(c) and reverse the Board's decision and remand this matter to the Board with directions to the Board to assign an effective date in accordance with 38 C.F.R. § 3.156(c).

II. Rate of Disability Compensation.

Congress provides the rates for disability compensation for purposes of 38 U.S.C. § 1110 under 38 U.S.C. § 1114. Congress annually increases the amount of the rate of compensation. During the period from September 1994 to March 2002, the rates for total disability compensation were –

Period:	Rate:
September 1, 1994 – November 30, 1994	$1,879
December 1, 1994 – November 30, 1995	$1,930
December 1, 1995 – November 30, 1996	$1,979
December 1, 1996 – November 30, 1997	$2,036
December 1, 1997 – November 30, 1998	$2,078
December 1, 1998 – November 30, 1999	$2,104
December 1, 1999 – November 30, 2000	$2,153
December 1, 2000 – November 30, 2001	$2,228
December 1, 2001 – February 28, 2002[6]	$2,287

A. 38 U.S.C. § 1114(j) Provides the Rate of Disability Compensation for a Disability Rated as Totally Disabling.

The VA informed Mr. Matthews of its calculation of the amount of past-due benefits on March 20, 2002. On that date, 38 U.S.C. 1114(j) provided that the amount of compensation for total disability *shall be* $2,163 per month. Had the VA granted Mr. Matthews a total disability compensation in *1994,* for example, then the calculation of the rate of disability compensation at $1,879 per month commencing September 1, 1994, would have been

[6] The award letter of March 20, 2002, contains the above referenced calculations but was not made part of the record on appeal. Mr. Matthews has attached to his brief a copy of the March 20, 2002, award letter. It should be noted that the rate of compensation in March of 2002 is shown as $2,287, rather than $2,163 because that amount reflects the additional compensation paid for dependent benefits. Mr. Matthews was paid additional compensation for his spouse.

correct and in accordance with the version of 38 U.S.C. § 1114(j) which was extant at that time. However, the VA *did not* grant Mr. Matthews his entitlement to total disability compensation until March of *2002*. In March of 2002, § 1114(j) *required* that the rate of compensation to be paid for total disability compensation was to be calculated at the monthly rate of $2,163.

B. The VA Incorrectly Applied 38 U.S.C. § 1114(j).

The plain language of 38 U.S.C. § 1114(j) as it existed in March of 2002, *mandated* that "if and while the disability is rated as total *the monthly compensation shall be $2,163*." Emphasis added. The question of law presented in this appeal is whether the VA correctly applied 38 U.S.C. § 1114(j) to the calculation of the rates of disability compensation for the award of past-due benefits from September 1994 to March 2002. The calculation made by the VA is predicated on the rates provided for from September 1994 to March 2002, not the rate required in 2002 by § 1114(j).

The relevant language in § 1114(j) is "if and while the disability is rated." Mr. Matthews's disability *was not* rated totally disabling from September 1994 to March 2002. It was *only* as a result of the rating decision of February 14, 2002, R. 656-661, that Mr. Matthews was rated *totally disabled*. Therefore, it was the February 14, 2002, rating decision that provided for Mr. Matthews to be *retroactively* rated totally disabling. The "if and while" of Mr. Matthews's disability from September 1994 to March 2002 did not become *rated* until after the VA's February 2002 decision. Consequently, the provisions of 1114(j) extant in March of 2002 required that the monthly

compensation "*shall be* $2,163." The compensation provided to Mr. Matthews following the VA's decision of February 2002 did not calculate Mr. Matthews's award of past-due benefits in accordance with the requirements of 38 U.S.C. § 1114(j).

C. *Smith v. Principi* and *Sandstrom v. Principi* are Not Controlling.

The Board erred in its legal determination that:

> It is the law, and not the evidence, which is dispositive of his claim for payment of VA compensation at the 2001 rate for an award for a total rating for PTSD in retroactive monthly payments effective from September 1, 1994. *See* ***Sabonis v. Brown***, 6 Vet.App. 426 (1994).

R. 8.

It is correct that the law and not the evidence are dispositive of Mr. Matthews's claim, but as discussed above, the Board still misunderstands the plain meaning of 38 U.S.C. § 1114(j).

Furthermore, the holdings for the Federal Circuit in ***Smith v. Principi***, 281 F.3d 1384 (Fed.Cir. 2002), and ***Sandstrom v. Principi***, 358 F.3d 1376 (Fed.Cir. 2004), are not dispositive of Mr. Matthews's entitlement to the rate of compensation required for his total disability rating for the period from September 1994 to March 2002.

The Board concluded:

> His retroactive payments of VA compensation at the 100 percent rate have been fully paid to him in accordance to the monthly compensation rates

> in effect for the specific year in which the payment was due him. No additional retroactive payments may be allowed him as a matter of law.

R. 8. The Board denied Mr. Matthews's claim because the VA reads into the statute authority to pay "monthly compensation rates in effect for the specific year in which the payment was due" in the calculation of the amount of retroactive payments of VA compensation at the 100 percent rate. That provision is imaginary. The plain language of § 1114(j) requires the VA to calculate the rate of disability compensation based upon the law in effect at the time of the award to him of a total disability rating – March of 2002.

At issue in ***Smith*** was whether 38 U.S.C. §§ 503(a) and 5109A were waivers of the "no interest" rule. 281 F.3d. at 1386, 1387. Mr. Smith appealed this Court's decision that he was not entitled to interest on his award of clear and unmistakable error. The Federal Circuit affirmed this Court's holding that Mr. Smith was not entitled to interest. 281 F.3d. at 1388, 1389. Mr. Matthews does not seek interest. Mr. Matthews seeks the calculation of his disability compensation based upon his award of past-due benefits in accordance with the law as it existed at the time of that award, as the "if and while" clause of 1114(j) requires.

In ***Sandstrom***, Mr. Sandstrom claimed that the payment of 1969 dollars (for example) made in 1996 did not have the "same effect" as a payment of nominal 1969 dollars made in 1969. 358 F.3d at 1379. Mr. Sandstrom further claimed that Congress intended the annual cost of living adjustments to keep the statutory compensation constant in real dollars and that the legislative intent entitled him to the amount of compensation at the time that the error was corrected, retroactively throughout the

entire period. 358 F.3d at 1379. The Federal Circuit held that this Court correctly concluded that the government had not waived its sovereign immunity. 358 F.3d at 1381. ***Sandstrom*** affirmed the denial of retroactive payment for his VA disability benefits at an increased statutory rate. 358 F.3d at 1381.

Mr. Matthews's claim does not rely upon or involve the "same effect" language of 38 U.S.C. § 5109A. Mr. Matthews's claim does not involve a clear and unmistakable error made by the VA. Mr. Matthews relies upon the plain language of § 1114(j) to support his entitlement to the calculation of his disability compensation awarded for the period from September 1994 to March 2002, based upon the law as it existed at the time of that award.

Mr. Matthews does not rely upon a waiver of sovereign immunity. Mr. Matthews relies upon the plain and unambiguous language of the statute that the rate of compensation "*shall be* $2,163" per month, "if and while" Mr. Matthews was rated totally disabled. Because Mr. Matthews *was not* rated totally disabled until March of 2002, the calculation of past-due benefits could not be made upon provisions of law which had been superceded by new enactments of Congress.

Conclusion

The Board's decision of March 4, 2004, must be vacated and remanded because of the Board's misinterpretation of 38 C.F.R. § 3.156(c). Mr. Matthews respectfully requests that this Court reverse the 2004 decision of the Board of Veterans' Appeals and remand this matter to the Board with instructions that the Board direct the Secretary to pay Mr. Matthews at the rate required by 38 U.S.C.

§ 1114(j) in March of 2002 for the period of total rating for his disability compensation from September 1994 to March 2002.

Respectfully Submitted,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant,
Allan S. Matthews

Certificate of Service

The undersigned hereby certifies that the original and three copies of the above and foregoing document were sent UPS overnight mail to the Clerk, CAVC, and one copy has been mailed postage prepaid on this 22nd day of October, 2004, addressed to:

David Lowenstein (027)
Office of the General Counsel
United States Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, District of Columbia 20420

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter

LAW OFFICES OF

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KENNETH M. CARPENTER
Chief Executive Officer

GLENDA S. HERL
Chief Operating Officer

April 15, 2003

Wayne Hill
Veterans Service Center Manager
Department of Veterans Affairs
Regional Office
5500 East Kellogg
Wichita, KS 67218-1698

RE: MATTHEWS, ALLAN S.
C-File 22 881 141
SSN 510 44 2216

BENEFIT SOUGHT:

ENTITLEMENT TO A TOTAL RATING FOR THE VETERAN'S SERVICE-CONNECTED PTSD FROM JULY 29, 1976.

PURPOSE OF CORRESPONDENCE:

SUBSTANTIVE APPEAL ON THE ISSUE OF ENTITLEMENT TO AN EARLIER EFFECTIVE DATE PRIOR TO AUGUST 5, 1994 FOR THE GRANT OF SERVICE CONNECTION AND ENTITLEMENT TO A TOTAL RATING FOR THE VETERAN'S SERVICE-CONNECTED POST TRAUMATIC STRESS DISORDER.

Dear Mr. Hill:

This appeal responds to the Statement of Case dated March 3, 2003. The veteran herewith expresses disagreement with the decision contained in that Statement of Case and requests this letter be accepted in lieu of VA Form 9.

In addition to the arguments made herein, the veteran intends to dispute every statement, allegation or inference contained in the Rating Decision and Statement of Case that is inconsistent with the veteran's position on the issues, or not expressly admitted by the veteran.

PROCEDURAL HISTORY

The original claim in this matter was filed in July 29, 1976. Service connection was denied in a Ratings Decision of January 19, 1981. No appeal was taken. On August 5, 1994, the veteran filed a claim to reopen and was eventually awarded service connection for PTSD and assigned a 100% rating from August 5, 1994, the date of his reopened claim.

The veteran initiated an appeal on December 31, 2002, filing a Notice of Disagreement. A Statement of Case was issued on March 3, 2003.

On February 14, 2002, based upon new and material evidence including supplemental service records which verified the veteran's in-service stressors received from the U.S. Armed Services Center for Research of Unit Records (USASCRUR), revealed that the USS Coral Sea was involved in combat action, the veteran's claim was granted.

The veteran now seeks "appellate review" by the Board of Veterans' Appeals by filing this substantive appeal, with the Statement of Case of March 3, 2003.

ISSUE I: ENTITLEMENT TO AN EARLIER EFFECTIVE DATE OF JULY 29, 1976 BASED UPON 38 C.F.R. § 3.156(c).

The veteran asserts that he is entitled to an effective date of July 29, 1976, the date of the original claim for service connection. In support of the veteran's assertion, the veteran relies upon 38 C.F.R. § 3.156(c).

The Agency's decision not to apply 38 C.F.R. § 3.156(c) is a clear error of law. The Rating Decision of February 14, 2002, clearly relies upon the, "Unit history records received from the US Armed Services Center for Research of Unit Records (USASCRUR)." 38 C.F.R. § 3.156(c) states, "Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction." (Emphasis added) The claimant asserts that the Agency's consideration of the claimant's unit records as provided by USASCRUR constituted "new and material evidence" in the form of a supplemental report from the service department which had been received after the original decision became final.

The Rating Decision of February 14, 2002, correctly granted service connection for PTSD based upon the veteran's unit history as provided by USASCRUR which confirmed that he was in combat. The Agency's decision concedes that its reliance upon the supplemental report from the service department for the first time in the

adjudication of the veteran's claim, was necessarily predicated upon a supplemental report from the service department. It was, therefore, new and material evidence, submitted after the original decision had become final.

The record in this case confirms that the Agency, in a Ratings Decision of February 14, 2002, granted service connection for PTSD. This means, obviously, that new and material evidence was submitted and included consideration of the veteran's unit history as provided by USASCRUR and a confirmed diagnosis of PTSD. This is based upon the plain language of the regulation which provides, as in this case, when new and material evidence, in the form of a supplemental report from a service department, is received at any time, after a final decision, "the former decision will be reconsidered by the adjudicating agency of original jurisdiction."

In the instant matter, the Agency has failed to reconsider the former or original decision denying service connection for "a psychiatric disorder," as required by 38 C.F.R. § 3.156(c). The regulation requires the Agency to reconsider the former decision, which the Agency has failed to do.

CONCLUSION

The claimant asserts that he is entitled to an effective date to be assigned the veteran's grant of service connection and the award of a total rating of July 29, 1976 and that the current August 5, 1994, date is inconsistent with the provisions of 38 C.F.R. § 3.156(c). The Agency's assignment of an effective date fails to consider and apply 38 C.F.R. § 3.156(c). The regulation requires the reconsideration of the previously final decision, which the Agency has

failed to do. The Agency's failure to apply 38 C.F.R. § 3.156(c) is arbitrary, capricious, and not otherwise in accordance with law.

Your prompt attention to this matter is requested, this matter should be certified for appeal to the Board of Veterans' Appeals, and the claims folder transferred to the Board for completion of appellate review.

Sincerely,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Allan S. Matthews

KMC:tc/slj
cc: Mr. Allan S. Matthews

M:\VA\Matthews.A\VA-9.KMC

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KENNETH M. CARPENTER
Chief Executive Officer

GLENDA S. HERL
Chief Operating Officer

March 3, 2003

Wayne Hill
Veterans Service Center Manager
Department of Veterans Affairs
Regional Office
5500 East Kellogg
Wichita, KS 67218-1698

RE: MATTHEWS, ALLAN SAMUEL
C-File C 22 881 141
SSN 510 44 2216
BENEFIT SOUGHT:

ENTITLEMENT TO FULL AMOUNT OF PAST-DUE BENEFITS TO WHICH THE CLAIMANT IS ENTITLED PURSUANT TO 38 U.S.C. § 1114(j).

PURPOSE OF CORRESPONDENCE:

NOTICE OF DISAGREEMENT with the award letter calculating the amount of monthly entitlement due the veteran dated March 20, 2002.

REQUEST FOR DECISION REVIEW TELEPHONE CONFERENCE.

Dear Mr. Hill:

I have previously filed a properly executed VA Form 22a appointing me as the representative of the above-referenced veteran.

On March 20, 2002, the Regional Office (RO) for the Department of Veterans Affairs in Wichita, Kansas, issued a Notice of Award calculating the amount of monthly entitlement due the veteran based upon an award of entitlement to compensation.

Pursuant to the regulation authorizing Decision Review Officers to conduct hearings with the claimant and/or the claimant's representative, the claimant hereby requests that a decision review conference be conducted in this matter.

The claimant specifically requests that the Decision Review Officer contact his representative in order to conduct an informal telephone conference regarding the calculation made of the amount of benefit entitlement to which the veteran was entitled.

The veteran disagrees with the Agency's calculation of the amount of benefit entitlement as reflected in the Agency's award letter of March 20, 2002. The veteran asserts that the Agency's calculations are incorrect and as a result have caused the veteran to receive a lesser amount of compensation than the amount of compensation to which the veteran is entitled.

The veteran asserts that, based upon the plain language of 38 U.S.C. § 1114, which is entitled "Rates of wartime disability compensation," the veteran is entitled to compensation in the amount of $2,163 per month, pursuant to 38 U.S.C. § 1114(j). The award letter of March

20, 2002 has calculated the compensation to which the claimant is entitled at a progressively increasing rate, beginning in the amount of $1,879 per month from September 1, 1994, and not reaching the $2,163 rate per month until December 1, 2001.

The veteran contends that the plain language of 38 U.S.C. § 1114(j) states, "For the purposes of section 1110 of this title – (j) if and while the disability is rated as total the monthly compensation shall be $2,163." (Emphasis added) The statute requires that if and while the claimant's disability is rated as total, the amount of the monthly disability compensation shall be $2,163. The award letter of March 20, 2002 calculated the veteran's entitlement to benefits in a manner inconsistent with the mandate of 38 U.S.C. § 1114(j).

The veteran was not rated as totally disabled until the Rating Decision of February 14, 2002. Consequently, he was not rated totally disabled in September of 1994. Therefore, the progressive calculation of the veteran's entitlement to the amount of monthly benefits should not have been calculated on the amount of compensation for a total rating in September of 1994, or at any date thereafter until he was totally rated in February of 2002.

It was the Agency which failed to properly rate the veteran, as totally disabling in September of 1994, and at all dates thereafter until February of 2002. The plain language of 38 U.S.C. § 1114(j) contemplates that the amount of compensation is to be calculated only if and while the disability is totally rated. The veteran's disability was not totally rated until February of 2002. Therefore, the correct calculation, pursuant to 38 U.S.C. § 1114(j),

should have been at the $2,163 monthly rate from September 1, 1994.

NOTICE OF DISAGREEMENT

Pursuant to 38 C.F.R. § 19.26 and Title 38, United States Code § 7105(d)(1), the veteran herewith expresses disagreement with the award letter calculating the veteran's entitlement amount to his total rating for his monthly compensation contained in the March 20, 2002 award letter.

The veteran requests that the Agency reconsider the calculations made in the March 20, 2002 award letter. Specifically, that the Agency recalculate the veteran's entitlement to the amount of compensation based upon the plain language of 38 U.S.C. § 1114(j). If, after reexamination, a more favorable decision in the form of a recalculation of the amount of entitlement to compensation is made based upon the plain language of 38 U.S.C. § 1114(j), it is requested that a Statement of the Case be issued so the veteran can perfect an appeal.

CONCLUSION

The veteran is entitled to monthly compensation at the rate of $2,163 from September 1, 1994. The Agency's current calculation of the amount of entitlement to past-due benefits is incorrect and inconsistent with the mandate of 38 U.S.C. § 1114(j). Therefore the current award letter and the calculation therein is arbitrary, capricious, and not otherwise in accordance with law.

It is requested that the March 20, 2002 award letter be corrected, that a new calculation of the veteran's past-due benefit amount be made, that the Agency correct the errors made in the calculation of the amount of past-due benefits to which the veteran is entitled, and to issue to the veteran an amended award letter and payment of the total amount of past-due benefits to which he is entitled.

It is further requested that a Decision Review Officer contact the claimant's representative in order to conduct an informal telephone conference regarding this Notice of Disagreement.

Sincerely,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Allan S. Matthews

KMC:ws/slj
cc: Allan S. Matthews

M:\VA\Matthews.A\NOD-CALC.PDB

[SEAL]

DEPARTMENT OF VETERANS AFFAIRS
Medical & Regional Office Center
5500 East Kellogg Avenue
Wichita KS 67218-1698

In Reply Refer To: 452/211
C 22 881 141
MATTHEWS, Allan Samuel

Dear Mr. Matthews:

We made a decision on your claim for an increase in your service connected compensation received on September 25, 2001.

This letter tells you about your entitlement amount and payment start date and what we decided. It includes a copy of our rating decision that gives the evidence used and reasons for our decision. We have also included information about additional benefits, what to do if you disagree with our decision, and who to contact if you have questions or need assistance.

What Is Your Entitlement Amount And Payment Start Date?

Your monthly entitlement amount is shown below:

Monthly Entitlement Amount	Payment Start Date	Reason For Change
$1,879.00	Sep 1, 1994	combined evaluation increased to the 100% rate
1,930.00	Dec 1, 1994	cost of living increase
1,979.00	Dec 1, 1995	cost of living increase

2,036.00	Dec 1, 1996	cost of living increase
2,078.00	Dec 1, 1997	cost of living increase
2,104.00	Dec 1, 1998	cost of living increase
2,153.00	Dec 1, 1999	cost of living increase
2,228.00	Dec 1, 2000	cost of living increase
2,287.00	Dec 1, 2001	cost of living increase

We are paying you as a veteran with one dependent. Your payment includes an additional amount for your spouse. *Let us know right away if there is any change in your marital status.*

When Can You Expect Payment?

Your payment begins the first day of the month following your effective date. You will receive a payment covering the initial amount due under this award, minus any withholdings, in approximately 15 days. Payment will then be made at the beginning of each month for the prior month. For example, benefits due for May are paid on or about June 1.

What Did We Decide?

We determined that the following condition(s) was/were related to your military service, so service connection has been granted:

Medical Description	Percent (%) Assigned	Effective Date
Post-traumatic stress disorder	100%	Aug 5, 1994

This decision is considered a full grant of benefits sought on appeal, and therefore, your appeal is withdrawn.

Effective August 5, 1994, we assigned a permanent 100% disability evaluation for your service connected disability/disabilities.

No examination will be scheduled in the future for your permanent and total disability/disabilities.

Entitlement to special monthly compensation based on the need for regular aid and attendance or being housebound is denied.

Aid and Attendance

You must meet one of the following conditions to receive the Aid and Attendance benefit:

- You need constant help with your daily needs such as bathing, dressing or eating, *OR*
- You are blind, *OR*
- You are a patient in a nursing home.

Housebound

You must meet one of the following conditions to receive the Housebound benefit:

- Your disability confines you to your home, *OR*
- You have one condition rated 100% disabling *AND* another condition rated 60% or more disabling

We have enclosed a copy of your Rating Decision for your review. It provides a detailed explanation of our decision,

the evidence considered and the reasons for our decision. You can find the decision discussed in the section titled "*Decision*." The evidence we considered is discussed in the section titled "*Evidence*." The reasons for our decision can be found in the portion of the rating titled "*Reasons for Decision*" or "*Reasons and Bases*."

We have also enclosed *VA Form 21-8764, "Disability Compensation Award"*, which explains other VA disability benefits.

We enclosed a VA Form 21-8760, "Additional Information for Veterans with Service-Connected Permanent and Total Disability," which explains certain factors concerning your benefits.

How Do You Start Direct Deposit?

Your money may be deposited directly into your checking or savings account. This is the safest and most reliable way to get your money. For more information about Direct Deposit, please call us toll free by dialing 1-877-838-2778.

Are You Entitled To Additional Benefits?

Your dependents may be eligible for Dependents' Educational Assistance. We are enclosing a VA pamphlet 22-73-3, "Summary of Education Benefits," which explains the program. To make a claim, complete and return the enclosed VA Form 22-5490.

You may be able to receive vocational rehabilitation employment services. The enclosed VA Form 28-8890, "Important Information About Vocational Rehabilitation Benefits," explains this benefit completely. To apply for

this benefit, complete and return the enclosed VA Form 28-1900, "Disabled Veterans Application for Vocational Rehabilitation."

You are entitled to medical care by the VA health care system for any service connected disability. You may apply for medical care or treatment at the nearest medical facility. If you apply in person, present a copy of this letter. If you apply by writing a letter, include your VA file number and a copy of this letter.

Because of the rating action described in this letter, you may be eligible to have your government life insurance premiums waived. (This doesn't apply if you have Veterans Group Life Insurance [VGLI]). *If your answer is "yes" to all of the following questions,* you should contact the VA Insurance Center at the following toll free telephone number in order to request a "waiver of premiums" on your government life insurance policy. Call 1-800-669-8477.

- Do you have an active government life insurance policy?
- Do you currently pay premiums for your government life insurance policy?
- Are you considered to be unemployable, or are you rated 100% disabled by VA?
- Were you under age 65 when you became unable to work or 100% disabled?

Your dependents may be entitled to benefits under CHAMPVA. CHAMPVA is a health benefits program in which the Department of Veterans Affairs (VA) shares the cost of certain healthcare and supplies with eligible beneficiaries. To be eligible for the CHAMPVA program a

dependent must be the spouse or child of a veteran who is permanently and totally disabled from a service-connected disability. The Health Administration Center in Denver, Colorado administers the CHAMPVA program. You should call 1-800-733-8387 if additional information is needed.

What You Should Do If You Disagree With Our Decision.

If you do not agree with our decision, you should write and tell us why. You have *one year from the date of this letter to appeal the decision.* The enclosed *VA Form 4107, "Your Rights to Appeal Our Decision,"* explains your right to appeal.

Do You Have Questions Or Need Assistance?

If you have any questions or need assistance with this claim, please call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.

If you call, please refer to your VA file number 22 881 141. If you write to us, put your full name and VA file number on the letter. Please send all correspondence to the address at the top of this letter. You can visit our web site at www.va.gov for more information about veterans' benefits.

We sent a copy of this letter to Carpenter Chartered because you appointed them as your representative. If you have questions or need assistance, you can also contact them.

Duty To Assist

On November 9, 2000, The Veterans Claims Assistance Act of 2000 (VCAA) was signed into law. This law establishes new duties for the Department of Veterans Affairs (VA) when you file an application for disability benefits.

Under this new law, when you file an application for VA benefits, we will tell you what information or evidence is required to establish entitlement to that benefit. We will tell you which information and/or evidence we will try to get and which information or evidence you need to give us. We must make reasonable efforts to help you get medical and/or other evidence necessary to support your claim.

The enclosed rating decision granting your claim tells you what is needed to establish entitlement to the benefit you applied for. It shows that the evidence we received was enough to support your claim. You don't need to send further evidence now to establish entitlement to your benefit.

There may be other evidence you would like us to consider. In that case, please tell us about it and we will make reasonable efforts to try to get it. Other evidence can include records held by any Federal agency including VA, or by private doctors, hospitals or clinics. To help us get the evidence we will need the following information:

- the name of the person, agency, or company who has the relevant records;
- the address of this person, agency, or company
- the approximate time frame covered by the records
- the condition for which you were treated

In addition, we will need you to complete, sign and return the enclosed VA Form 21-4142, "Authorization for Release of Information." Use a separate form for each doctor or hospital where you received treatment. You can help with your claim by getting the evidence and sending it to us.

Send the information describing additional evidence or the evidence itself to the address at the top of this letter within one year from the date of this letter. Please put your full name and VA file number on the evidence.

Sincerely yours,

W. Hill
W. Hill
Veterans Service Center Manager

Enclosure(s): Rating Decision
VA Form 21-8760
VA Form 22-5490
VA pamphlet 22-73-3
VA Form 28-1900
VA Form 28-8890
VA Form 4107
VA Form 21-4142
VA Form 21-8764

cc: CARPENTER CHARTERED